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No. 91-169

In The

Supreme Court of the United States

October Term, 1991

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

SIERRA CLUB, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the federal facilities provision of the Clean Water Act, § 313, 33 U.S.C. § 1323, waives the sovereign immunity of the United States from assessment of civil penalties for violation of a permit issued by the United States Environmental Protection Agency under authority of the Act.

2. Whether the citizen suit provision of the Clean Water Act, § 505, 33 U.S.C. § 1365, waives the sovereign immunity of the United States from assessment of civil penalties for violation of a permit issued by the United States Environmental Protection Agency under authority of the Act.

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Plaintiffs/respondents Sierra Club and Colorado Environmental Coalition, by their attorney Adam Babich, respectfully submit their Brief in Opposition.

SUMMARY OF THE ARGUMENT

This case is not appropriate for certiorari review. The Tenth Circuit's decision does not conflict with that of

another United States court of appeals. Nor does it conflict with a decision of a state court of last resort. Moreover, the decision below is consistent with and compelled by the plain language of the Clean Water Act. That Act explicitly waives sovereign immunity from any "process and sanctions respecting the control and abatement of water pollution" with the limitation that "the United States shall be liable only for those civil penalties arising under Federal law. . . . " Clean Water Act § 313(a), 33 U.S.C. § 1323(a).

The petition should not be held pending this Court's decision in *United States Dep't of Energy v. State of Ohio*, Nos. 90-1341 & 90-1517, because this case does not present the same issues as the *Ohio* case. The *Ohio* case involves violation of a permit issued by the State of Ohio under authority of state law. Pursuant to an approval by the United States Environmental Protection Agency (EPA), Ohio implements its state law in lieu of the federal Clean Water Act program. *See* Clean Water Act § 402(b), 33 U.S.C. § 1342(b). Thus, the *Ohio* case turns largely on the issue of whether penalties under an EPA-approved state law are "civil penalties arising under Federal law" within the meaning of Clean Water Act § 313(a), 33 U.S.C. § 1323(a). In contrast, this case involves Petitioners' violation of a permit issued directly by EPA.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION IS CORRECT AND DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Respondents cannot improve on the clarity or force of the Tenth Circuit's explanation of the plain language of the Clean Water Act in the decision set forth as Appendix A to the Petition. *Sierra Club v. Lujan*, 931 F.2d 1421 (10th Cir. 1991). Rather than repeating the arguments here, Respondents simply note that the opinion demonstrates that the Tenth Circuit's ruling was compelled by plain, unambiguous statutory language, logic and common sense.

As the Tenth Circuit notes and Petitioners do not dispute, the only contrary opinion is that of the district court in *McClellan Ecological Seepage Situation v. Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986). Moreover, a subsequent Ninth Circuit opinion calls the McClellan decision into question. Specifically, in *Parola v. Weinberger*, 848 F.2d 956, 962 n.3 (9th Cir. 1988), the Ninth Circuit ruled that language in Clean Air Act § 118, 42 U.S.C. § 7418 – which is substantially identical to language at issue here – shows that Congress "knows how to select language to waive sovereign immunity to criminal penalties and civil damages, if it so intends." In *State of Ohio v. Dep't of Energy*, 904 F.2d 1058, 1060 (6th Cir. 1990), *cert. granted*, 111 S.Ct. 2256 (1991), both the majority and the dissent agreed that the Clean Water Act waives immunity from civil penalties arising under federal law. The dissent stated:

> Analysis of [33 U.S.C.] section 1323(a) . . . leads to the inescapable conclusion that Congress has waived sovereign immunity in the Clean Water Act for all civil penalties arising under federal, but not state, law.

904 F.2d at 1067 (Guy, J. dissenting). There is no contrary holding by a state court of last resort.

Because of the lack of conflict in the circuits and the clarity of the statutory provisions at issue, the Tenth Circuit's ruling is not appropriate for certiorari review. Petitioners' concern about the "potentially large monetary judgment," Petition at 6, should be addressed to Congress. *Cf. H.J. Inc, v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989) (rewriting statutes "is a job for Congress, if it is so inclined, and not for this Court.")

II. THE PETITION SHOULD NOT BE HELD; IT PRESENTS DIFFERENT ISSUES THAN *UNITED STATES DEP'T OF ENERGY v. STATE OF OHIO.*

Petitioners ask this Court to hold the Petition, and thus, delay final resolution of this litigation, pending a decision in *United States Dep't of Energy v. State of Ohio*, Nos. 90-1341 & 90-1517. It is probable, however, that a decision in *Ohio* will not control this case.

In its opinion below, the Tenth Circuit carefully distinguished this case from *Ohio*, noting:

> Unlike the permit in the case at bar, which the EPA issued under authority of 33 U.S.C. § 1342, the *State of Ohio* permit was issued by the state under Ohio's statutory scheme.

Sierra Club v. Lujan, 931 F.2d 1421, 1426 (10th Cir. 1991), Petition, Appendix A, at 11a. This difference is important because the Clean Water Act limits its waiver to, *inter alia*, "civil penalties arising under Federal law. . . . " Clean Water Act § 313(a), 33 U.S.C. § 1323(a). It is doubtful that this Court will reach in *Ohio* the question of sovereign immunity from penalties for violation of EPA-issued permits.

Petitioners state: "In *Ohio*, the State sought civil penalties under the CWA itself, as well as under the civil penalties provision of the state water pollution control scheme." Petition at 4-5. Petitioners are referring to an issue that the Sixth Circuit did not address in *Ohio:* whether penalties may be recovered for a state-issued permit under Clean Water Act § 505(a), 33 U.S.C. § 1365(a) – the Clean Water Act's citizen suit provision.[1] Even if this Court chooses in *Ohio* to decide this issue, the Court's ruling would not necessarily control the instant case – involving an EPA-issued permit. There is no EPA-issued permit at issue in *Ohio*.

Petitioners note that the Sixth Circuit, in *Ohio*, decided an issue "related" to the Tenth Circuit's ruling that the Clean Water Act's citizen suit provision, § 505(a), 33 U.S.C. § 1365(a), waives sovereign immunity. Petition at 6. The *Ohio* court's ruling, however, was under the citizen suit provision of the Resource Conservation and

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[1] Elsewhere, the federal government has acknowledged "The [Sixth Circuit] court of appeals did not reach this issue. . . . " Brief for the Petitioner, *State of Ohio v. United States Dep't of Energy*, No. 90-1341 & 90-1517 (U.S., filed July 25, 1991) at 31, n. 25.

Recovery Act (RCRA), § 7002(a), 42 U.S.C. § 6972(a). Petition at 6. This Court's resolution of the RCRA issue in *Ohio* will not necessarily control the instant case.

In the context of sovereign immunity, the citizen suit provisions of RCRA and the Clean Water Act must be analyzed against the backdrop of the general waivers of sovereign immunity found in RCRA § 6001, 42 U.S.C. § 6961, and in Clean Water Act § 313(a), 33 U.S.C. § 1323(a). It is beyond dispute that these general waivers differ significantly. *See Mitzelfelt v. Dep't of the Air Force*, 903 F.2d 1293, 1295-96 (10th Cir. 1990). Specifically, unlike Clean Water Act § 313(a), 33 U.S.C. § 1323(a), RCRA § 6001 does not explicitly waive immunity for "sanctions." 42 U.S.C. § 6961.

Because the Tenth Circuit found a general waiver of sovereign immunity for violations of federally-issued permits in Clean Water Act § 313(a), the additional waiver in the Act's citizen suit provision [§ 505(a)] is cumulative of, and confirmed by, the Act's general waiver [§ 313(a)]. Accordingly, even if Clean Water Act § 505(a) did not clearly waive sovereign immunity in and of itself (which it does), courts could still use § 505(a) to apply, in the context of citizen suits involving federally-issued permits, the general waiver of Clean Water Act § 313(a).

Because RCRA's general waiver, RCRA § 6001, 42 U.S.C. § 6961, is different from that of the Clean Water Act, a decision about whether RCRA's citizen suit provision waives sovereign immunity – like a decision about Clean Water Act state-issued permits – probably would not control the instant case, which in any event was decided correctly.

CONCLUSION

The petition for a writ of certiorari should be denied and should not be held.

Respectfully Submitted,

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